LIBRARY
SUPREME COURT, U. S.

FILED
MAY 5 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1159~~ 70-60

Superintendent of Insurance of the State of New York, as Liquidator of MANHATTAN CASUALTY COMPANY,

Petitioner,

versus

BANKERS LIFE AND CASUALTY COMPANY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

ARNOLD BAUMAN,
Attorney for Petitioner
No. 45 Rockefeller Plaza,
New York, New York 10020

PHILIP M. KAZIN
MORTON J. SCHLOSSBERG
Of Counsel

INDEX

PAGE

Table of Authorities ii

Opinions Below 1

Jurisdiction of This Court 2

Statutes and Regulations Involved 2

Questions Presented 4

Statement of the Case 5

A. Procedural History 5

B. The Facts 6

1. Sale of Manhattan Stock 6

2. Events Subsequent to January 24, 1962 8

Summary of Argument 12

ARGUMENT—

I. The Court below erred in affirming the dismissal of the complaint where the record disclosed that a board of directors was fraudulently induced to authorize the sale of securities owned by a corporation and the proceeds of such sale were diverted from the corporation 16

A. § 10(b) and Rule 10b-5 are violated when a board of directors is fraudulently induced to authorize the sale of securities of a corporation 17

PAGE

B. § 10(b) and Rule 10b-5 are violated when the proceeds from a sale of securities are misappropriated 24

C. The purposes of the Securities Exchange Act of 1934 are served by finding a violation of § 10(b) and Rule 10b-5 27

II. The purchaser-seller restriction enunciated in *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952), cert denied, 343 U.S. 956 (1952) should be abolished 32

III. The Court of Appeals erroneously ruled that Petitioner failed to allege a federal cause of action in connection with the transactions in certificates of deposit 35

CONCLUSION 37

TABLE OF AUTHORITIES

Cases:

A. T. Brod & Co. v. *Perlow*, 375 F.2d 393 (2d Cir. 1967) 20, 31

Allico Nat'l Corp. v. *Amalgamated Meat Cutters*, 397 F.2d 727 (7th Cir. 1968) 24

American Sumatra Tobacco Corp. v. *SEC*, 110 F.2d 117 (D.C. Cir. 1940) 30

Birnbaum v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952), cert. denied, 343 U.S. 956 (1952) 12, 15, 32, 34

Brennan v. *Midwestern United Life Insurance Co.*, 259 F.Supp. 673 (D. Ind. 1966), 417 F.2d 147 (7th Cir. 1969), cert. denied 397 U.S. 989, 90 S.Ct. 1122 (1970) 31

PAGE

City Nat'l Bank v. *Vanderboom*, 422 F.2d 221 (8th Cir. 1970), cert. denied, 399 U.S. 905, 90 S.Ct. 2196 (1970) 27
Cooper v. *North Jersey Trust Co.*, 226 F. Supp. 972 (S.D.N.Y. 1964) 24
Crane Co. v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), cert. denied, 400 U.S. 822, 91 S.Ct. 41 (1970) 28

Dasho v. *Susquehanna Corp.*, 380 F.2d 262 (7th Cir. 1967), cert. denied sub nom. *Bard* v. *Dasho*, 389 U.S. 977, 88 S.Ct. 480 (1967) 13, 22
Dauphin Corp. v. *Sentinel Alarm Corp.*, 206 F. Supp. 432 (D. Del. 1962) 22
Deckert v. *Independence Share Corp.*, 311 U.S. 282, 61 S.Ct. 229 (1940) 32

Erling v. *Powell*, 429 F.2d 795 (8th Cir. 1970) 22
Errion v. *Connell*, 236 F.2d 447 (9th Cir. 1956)) 26

Fratt v. *Robinson*, 203 F.2d 627 (9th Cir. 1953) 27

Globus, Inc. v. *Jaroff*, 266 F. Supp. 524 (S.D.N.Y. 1967) 13, 18, 22
Goodman v. *Hentz & Co.*, 265 F. Supp. 440 (N.D. Ill. 1967) 13, 18
Greenstein v. *Paul*, 400 F.2d 580 (2d Cir. 1968) 32, 34

Heit v. *Weitzen*, 402 F.2d 909 (2d Cir. 1968), cert. denied, 395 U.S. 903, 89 S.Ct. 1740 (1969) 27
Herpich v. *Wallace*, 430 F.2d 792 (5th Cir. 1970) 14, 25, 27, 28, 30
Hooper v. *Mountain States Securities Corp.*, 282 F.2d 195 (5th Cir. 1960), cert. denied, 365 U.S. 814, 81 S.Ct. 695 (1961) 12, 13, 22, 23, 28, 29, 30, 33

PAGE

Hoover v. *Allen*, 241 F.Supp. 213 (S.D.N.Y. 1965) 23

In re Calvert, 35 S.E.C. 141 (1953) 24
In re Lockaby, 29 S.E.C. 271 (1949) 24

J. I. Case v. *Borak*, 377 U.S. 426, 84 S.Ct. 1555 (1964)..26, 32

Kahan v. *Rosenstiel*, 424 F.2d 161 (3rd Cir. 1970), cert. denied sub nom. *Glen Alden Corp.* v. *Kahan*, 398 U.S. 950, 90 S.Ct. 1870 (1970) 28, 33
Kane v. *Central American Mining & Oil, Inc.*, 235 F. Supp. 559 (S.D.N.Y. 1964) 25

Landay v. *United States*, 108 F.2d 698 (6th Cir. 1939), cert. denied, 309 U.S. 681, 60 S.Ct. 721 (1940) 25

Matheson v. *Armbrust*, 284 F.2d 670 (9th Cir. 1960), cert. denied, 365 U.S. 870, 81 S.Ct. 904 (1961) 26
Mills v. *Electric Autolite Co.*, 396 U.S. 375, 90 S.Ct. 616 (1970) 13, 19, 20, 32

New Park Mining Co. v. *Cranmer*, 225 F. Supp. 261 (S.D.N.Y. 1963) 23, 25, 30

O'Neill v. *Maytag*, 230 F. Supp. 235 (S.D.N.Y. 1964) aff'd, 339 F.2d 764 (2d Cir. 1964) 22, 26

Pacific Insurance Co. v. *Blot*, 267 F. Supp. 956 (S.D. N.Y. 1967) 33
Pappas v. *Moss*, 393 F.2d 865 (3rd Cir. 1968) 14, 18, 26
Parker v. *Baltimore Paint & Chemical Corp.*, 244 F. Supp. 267 (D. Col. 1965) 14, 22, 24, 25
Puharich v. *Borders Electronics Co.*, CCH FED. SEC. L. REP. ¶ 92,141 (S.D.N.Y. 1968) 13, 14, 18, 23, 24

PAGE

Rekant v. *Desser*, 425 F.2d 872 (5th Cir. 1970) 14, 25, 26, 27, 31, 33

Ruckle v. *Roto American Corp.*, 339 F.2d 24 (2d Cir. 1964) 13, 18, 22, 28

Schoenbaum v. *Firstbrook*, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied sub nom. *Manley* v. *Schoenbaum*, 395 U.S. 906, 89 S.Ct. 1747 (1969) 18

SEC v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, 64 S.Ct. 120 (1949) 32

SEC v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 84 S.Ct. 275 (1963) 21, 28, 32

SEC v. *Federal Shopping Way Inc.*, No. 7351 (W.D. N.D. Wash. Aug. 6, 1969) aff'd, 433 F.2d 149 (9th Cir. 1970) 18

SEC v. *National Securities*, 393 U.S. 453, 89 S.Ct. 564 (1969) 32, 33

SEC v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (en banc), cert. denied sub nom. *Coates* v. *SEC*, 394 U.S. 976, 89 S.Ct. 1454 (1969) 14, 27

SEC v. *W. J. Howey Co.*, 328 U.S. 293, 66 S.Ct. 1100 (1946) 32

Silver v. *New York Stock Exchange*, 196 F. Supp. 209 (S.D.N.Y. 1961) rev'd, 302 F.2d 714 (2d Cir. 1962) rev'd, 373 U.S. 341, 83 S.Ct. 1246 (1963) 30

Simon v. *New Haven Board & Carton Co.*, 250 F. Supp. 297 (D. Conn. 1966) 18, 22, 23

Stevens v. *Vowell*, 343 F.2d 374 (10th Cir. 1965) 18

Stockwell v. *Reynolds*, 252 F. Supp. 215 (S.D.N.Y. 1965) 33

Superintendent of Insurance v. *Bankers Life and Casualty Co.*, 300 F. Supp. 1083 (S.D.N.Y. 1969), aff'd, 430 F.2d 355 (2d Cir. 1970) 17, 25

PAGE

Tcherepnin v. *Knight*, 389 U.S. 332, 88 S.Ct. 548 (1967) 28

United States v. *Robertson*, 181 F. Supp. 158 (S.D.N.Y. 1959), aff'd, 298 F.2d 739 (2d Cir. 1962) 24

Vine v. *Beneficial Finance Co.*, 374 F.2d 627 (2d Cir. 1967), cert. denied, 389 U.S. 970, 88 S.Ct. 463 (1967) 26, 28, 33

Voege v. *American Sumatra Tobacco Corp.*, 241 F. Supp. 369 (D. Del. 1965) 26

Statutes and Regulations:

Securities Act of 1933, Section 17(a), 15 U.S.C. § 77q(a) 2, 33, 36

Securities Act of 1933, Section 22, 15 U.S.C. § 77v .....

Securities Exchange Act of 1934, Section 2, 15 U.S.C. Section 78 b 14, 29, 30

Securities Exchange Act of 1934, Section 10(b), 15 U.S.C. § 78j(b) 2, 3, 12, 14, 15, 26, 27, 28, 29, 30, 31, 36, 37

Securities Exchange Act of 1934, Section 14(a), 15 U.S.C. § 78n 13, 20

Securities Exchange Act of 1934, Section 28, 15 U.S.C. Section 78 bb 26

28 U.S.C. § 1254(1) 2

Rule 10b-5 of The Securities and Exchange Commission, 17 CFR Section 240.10(b)(5) 2, 3, 12, 14, 15, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 30, 33, 34, 35, 36, 37

Miscellaneous:

Bromberg, A., Securities Law: Fraud—SEC Rule 10b-5, Section 7.6(1) (1969) 31

PAGE

Fleischer, Federal Corporation Law: An Assessment, 78 HARV. L. REV. 1146 (1965) 28

Loss, L., SECURITIES REGULATION (2d ed. 1961) 31

Note, Private Enforcement Under Rule 10b-5: An Injunction For a Corporate Issuer, 115 U. PA. L. REV. 618 (1967) 26

Hearings on H.R. 7852 and 8720, House Committee On Interstate and Foreign Commerce, 73d Cong., 2d Sess. (1934) 31

H.R. Rep. No. 85, 73d Cong. 1st Sess. (1933) 31

H.R. Rep. No. 1383, 73d Cong. 2d Sess. (1934) 31

Senate Report No. 1455, 73d Cong. 2d Sess. (1934) 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1159

Superintendent of Insurance of the State of New York, as Liquidator of MANHATTAN CASUALTY COMPANY,

Petitioner,

versus

BANKERS LIFE AND CASUALTY COMPANY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 430 F.2d 355 (1970) and is set forth at pages 97a-108a of the appendix.* The opinion of Judge Herlands of the District Court for the Southern District of New York is reported at 300 F.Supp. 1083 (1969) (A. 50a). The opinion of Judge Ryan of the District Court for the Southern District of New York is not officially reported but is printed in the appendix at 89a.

---

* Citations to appendix will hereinafter appear "(A. —)".

Jurisdiction Of This Court

The judgment of the Court of Appeals to be reviewed was entered on July 22, 1970 (A. 111a). The petition for rehearing and rehearing en banc was denied by orders dated September 30, 1970 (A. 112a and 113a). The petition for certiorari was filed in this Court on December 24, 1970, and certiorari was allowed on March 22, 1971 (A. 114a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes and Regulations Involved

This is an action for damages based on violations of section 17(a) of the Securities Act of 1933, hereinafter the Securities Act, 15 U.S.C. section 77q(a), 3 United States Code at 2658 (1964 edition), and section 10(b) of the Securities Exchange Act of 1934, hereinafter the Exchange Act, 15 U.S.C. section 78j(b), 3 United States Code at 2698 (1964 edition), together with Rule 10b-5, 17 CFR section 240.10(b)(5) at 296 (revised as of Jan. 1, 1970), promulgated thereunder.

Section 17(a) of the Securities Act states:

> "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make

the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Section 10(b) of the Exchange Act states:

"Section 10 It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5 provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security."

Questions Presented

1. Did the Court below err in affirming the dismissal of the complaint where the record disclosed that a board of directors was fraudulently induced to authorize the sale of securities owned by a corporation and the proceeds of such sale were wrongfully diverted from the corporation?

2. Are Rule 10b-5 and Section 10(b) violated where full value is paid by a purchaser of securities and the proceeds are immediately misappropriated by corporate seller's management and others as part of a fraudulent scheme to loot the corporation of its assets?

3. Are the purposes of the Securities Exchange Act of 1934 and § 10(b) served by finding a violation to exist herein?

4. Should the strict purchaser-seller limitations enunciated in *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952), cert. denied, 343 U.S. 956 (1952) be abolished?

5. Has the Court of Appeals, in holding that Petitioner has not alleged a federal cause of action in connection with the transactions involving certificates of deposit, ruled erroneously?

Statement of the Case

A. Procedural History

In May, 1963, the Superintendent of Insurance of the State of New York (Petitioner) was appointed Liquidator of Manhattan Casualty Company (Manhattan) by order of the New York State Supreme Court (Sup. Ct., N.Y. Co., Index No. 40931/1963). That order vested Petitioner with all the rights of action of Manhattan. In that capacity, Petitioner commenced this action in August, 1963. The Petitioner was not a party to the transactions complained of, nor did he possess first hand knowledge of the events in question. The complaint was drawn on the basis of facts disclosed at hearings held by the Insurance Department of the State of New York in connection with proceedings which led to the liquidation of Manhattan.

After six and one half years of extensive discovery, yielding approximately 12,000 pages of testimony and 500 documents marked for identification, additional facts foreshadowed by the allegations in the complaint have come to light and are included in the record.

The Note of Issue was filed on August 31, 1967. On April 17, 1968, defendant Bankers Life and Casualty Company (Bankers Life) moved in the United States District Court for the Southern District of New York for summary judgment. Judge Sylvester J. Ryan denied that motion without prejudice, and suggested that the questions of subject matter jurisdiction and Petitioner's standing to sue be reached *in limine* (A. 40a).

Accordingly, Bankers Life, defendant Belgian American Banking Corporation (Belgian Banking) and Belgian American Bank and Trust Company (Belgian Trust)

moved to dismiss this action pursuant to Rules 12(c) and 12(h) of the Federal Rules of Civil Procedure before the late Judge William B. Herlands. Defendants Irving Trust Company (Irving Trust), Garvin Bantel & Company (Garvin, Bantel) and George K. Garvin (Garvin) made identical motions before Judge Ryan. Both motions were granted by judgments entered on June 4, 1969 and June 17, 1969, respectively (A. 91a, 93a, 95a).

Petitioner appealed and on July 22, 1970, the United States Court of Appeals for the Second Circuit affirmed the judgments of the District Court. Judge Hays dissented. Although the majority opinion found as did Judge Herlands, that a fraud had been committed, the Court held that Petitioner had failed to allege a claim for relief under the federal securities acts. This Court allowed certiorari by order filed on March 22, 1971 (A. 114a).

B. The Facts

1. *Sale of Manhattan Stock.*

Manhattan was the victim of a fraudulent scheme whereby it was purchased with and looted of its assets. Until January 24, 1962, Bankers Life was the sole stockholder of Manhattan. The fraudulent scheme is reflected in the following events. On that day, Bankers Life sold its stock in Manhattan for $5,000,000 to a purchasing group which included Standish T. Bourne (Bourne) and James F. Begole (Begole). Bourne and Begole arranged in advance with Irving Trust that it would issue its check for $5,000,000 in payment of the purchase price to Bankers Life. On January 24, 1962, Irving Trust sent an officer with a check for $5,000,000 to attend the closing of the sale of the stock. At that closing he delivered the check made payable to Bankers Life as the purchase price for Manhattan stock.

At this point in time, Manhattan did not maintain an account at Irving Trust. Shortly after the closing, the entire Manhattan portfolio of government securities totaling almost $5,000,000 was sold to Second District Securities which delivered a check in the amount of $4,854,552.67 to Irving Trust representing the proceeds of the sale. Manhattan transferred cash to Irving to bring the total to $5,000,000. Irving Trust promptly applied the proceeds against the $5,000,000 check it had delivered to Bankers Life earlier that morning. These transactions, as well as those of the afternoon of January 24, 1962, were conceived by Garvin, a general partner in the note brokerage firm of Garvin, Bantel.

The perpetrators deceived Manhattan's board of directors into voting approval for the sale of Manhattan's portfolio of United States Government Bonds by representing that the proceeds would be used to purchase a certificate of deposit (CD) (A. 115a-122a). In short, Manhattan sold securities worth almost $5,000,000 as a result of the deception of its board of directors and received nothing in return.

In order to conceal the depletion of $5,000,000 of assets and Manhattan's resultant insolvency, a paper asset had to be created. As part of the scheme, Garvin and Garvin, Bantel had arranged in advance for a check swap to take place among three financial institutions on that very afternoon. Irving Trust issued a $5,000,000 check in the name of Manhattan which was tendered to Belgian Trust. Belgian Trust then issued a $5,000,000 CD in the name of Manhattan. John F. Sweeny (Sweeny), newly installed as President of Manhattan after its sale that morning, endorsed the CD over to New England Note Corporation (New England Note), a company controlled by Bourne. Bourne then endorsed the CD over to Belgian Banking, which used the

CD as collateral for a so-called $5,000,000 loan to New England Note. A Belgian Banking check for $5,000,000 representing the New England Note loan was immediately given to Irving Trust to repay it for its check to Belgian Trust. Thus an asset in identical amount to that of which Manhattan was defrauded was created in its name and carried on its books as cash without reference to its total hypothecation, for the sole purpose of concealment.

Belgian Banking made a second loan to New England Note in the amount of $250,000 which was distributed in part as follows: Belgian Banking $100,000, Bourne $50,000 Begole $50,000, and Garvin, Bantel $25,000.

At the close of January 24, 1962, ownership of the shares of Manhattan had been transferred. Irving Trust had issued two $5,000,000 checks. It was reimbursed in full for the first from the assets of Manhattan. It was reimbursed in full for the second by the check of Belgian Banking representing the proceeds from the so-called loan to New England Note for which a CD in the name of Manhattan served as collateral.

During this period, Manhattan had no account at Irving Trust. In order to conceal the transactions, Irving made a series of false entries on its books. These entries were supported by backdated letters obtained for Irving by Garvin from Bourne. The acts described above were all part of one fraudulent scheme designed to gain control of Manhattan by using its assets to meet the purchase price.

2. *Events subsequent to January 24, 1962.*

On July 24, 1962, the CD and the alleged loans made by Belgian Banking and Belgian Trust to New England Note matured. To continue to conceal the depletion of Manhattan's assets, Bourne, Garvin and Garvin, Bantel, Begole,

Belgian Banking and Belgian Trust arranged to renew the loans and to issue a new CD to be held as collateral in the manner of January 24, 1962. However, at this point Sweeny, the President of Manhattan and a member of its board, now fearful, objected to the fact that the certificate was to be hypothecated. The other named defendants therefore misrepresented to him and consequently to Manhattan whose agent he was, that the certificate to be issued would not be held as collateral and that the stock of Manhattan would be the sole collateral for the loans to New England Note. In fact, it was arranged for Begole to issue a letter to Belgian Trust and Belgian Bank indicating that the new CD was being held as collateral for the loans, which he did and Belgian Bank so held it thereafter. Thus Sweeny was induced through fraud to purchase a new CD which was rendered valueless to Manhattan by the acts of the schemers. The schemers made it appear that Belgian Trust owed $5,000,000 plus interest to Manhattan evidenced by the new CD, that Manhattan further had on deposit at Belgian Trust a sum in excess of $5,000,000 and New England Note owed Belgian Banking $5,250,000.

Since Sweeny insisted on keeping physical possession of the new certificate to display as the need might arise, Belgian Trust, to further conceal the true facts, issued another CD covering the same funds so that Belgian Bank might retain one to display to New York State bank examiners as collateral for the renewed loan.

Furthermore, in August 1962 Belgian Trust and Belgian Banking contrived to have Sweeny return the CD that had been given to him in July and to endorse a negotiable certificate in Manhattan's name. To accomplish this the bank official signed a letter falsely representing that the CD issued in July was being held in trust by Belgian Trust

for Manhattan, whereas in fact Belgian Trust agreed to sign this letter to obtain Sweeny's endorsement of the CD. Thereafter, Belgian Banking held the CD as collateral for the loan to New England Note under the letter of instructions issued by Begole without authorization from Manhattan. The endorsement of the July CD rendered it valueless to Manhattan. Sweeny's signature as Treasurer of Manhattan (an office he then held) was necessary to effect the collateralization and he was induced to sign only after it had been misrepresented to him that the certificate was to be held in trust and not as collateral. Sweeny, however, endorsed the certificate in his capacity as President of Manhattan which was ineffective to establish a collateralization. This was subsequently changed to "Treasurer" by another hand after the certificate was in the possession of Belgian Banking.

In August, 1962, Manhattan transmitted a CD for $500,000 drawn on the First National Bank of Boston which it owned free of all encumbrances, to Belgian Trust to be held in trust for safekeeping. However, in January 1963 the Belgian Trust CD matured and the loans (in the amount of $5,000,000 and $250,000 to New England Note and Bourne, respectively) fell due. Therefore, to continue to conceal the depletion of Manhattan's assets another series of misrepresentations was made which also resulted in the loss of this asset to Manhattan. The original plan was to effect a direct pair-off of the $5,000,000 CD against the $5,000,000 loan and to use the $500,000 CD to pay the interest on the $5,000,000 loan. The $250,000 loan was to be shipped to Boston together with the stock of Manhattan to be held by the Boston financial institution as collateral. However, this plan was discovered and thwarted by Sweeny.

Bourne, Garvin and Garvin, Bantel, Belgian Trust, Belgian Banking, Irving Trust and Begole then conspired

to effect the pair-off of CD's against the loans to New England Note in the following manner. It was misrepresented to Sweeny and Manhattan that Irving Trust would issue $5,500,000 worth of CD's for the account of Manhattan and that the loans for which the Belgian Trust certificates were being held as collateral were to be refinanced. Sweeny was told to instruct Belgian Trust to deliver the proceeds of those CD's to Irving Trust to effect payment for the new CD's to be issued by Irving Trust for Manhattan. Relying on this misrepresentation, Sweeny instructed Belgian Trust to pay the proceeds to Irving Trust. In fact, Garvin had arranged for his clearance bank, Marine Midland, to effect payment on $5,500,000 bearer certificates, which it did, and Irving Trust transmitted such certificates to Marine Midland. There they were held as collateral for the loan to Garvin by which payment was effected. Garvin then caused Irving Trust to issue a check payable to Belgian Banking in the amount of $5,250,000, presumably to pay off the loans to New England Note. However, this was nothing more than a check swap between Irving Trust, Belgian Banking, and Belgian Trust employed to make it appear that outside monies had been used to pay off the loans. Upon receipt of the Irving Trust check in the amount of $5,250,000, Belgian Trust drew a check payable to Irving Trust in the amount of $5,500,000 which it did and Irving Trust transmitted such certificates of interest which was paid into Manhattan's account) which were now held free and clear for Manhattan since the loans for which they had been held as collateral had been paid by the Irving Trust check. This check was supposed to be released to Irving Trust to effect payment on the Irving Trust CD's pursuant to Manhattan's letter of instruction signed by Sweeny to Belgian Trust. When Irving Trust received this money, instead of crediting it to Manhattan's account it was used to offset the $5,250,000 check it had

issued at Garvin's request payable to Belgian Banking and both checks were passed through the account of Garvin, Bantel.

Summary of Argument

The decision below is an unjustifiably narrow and technical interpretation of the scope of §10(b) of the Exchange Act and Rule 10b-5. Although the existence of a fraud is rceognized by the lower courts, it was determined to be not "in connection with" the purchase or sale of a security. It is the Petitioner's position (1) that the inducement of the board of directors by means of fraudulent material misrepresentations of fact to approve the sale of a corporate portfolio of United States Treasury bonds which results in the loss of an asset to the corporation is a violation of Rule 10b-5; (2) that the misappropriation of the proceeds from a corporate sale of securities is a violation of Rule 10b-5; (3) that in the light of the purposes for which the Exchange Act was enacted, a federal cause of action exists; (4) that a fraudulent scheme whereby a corporation is purchased with portfolio securities owned by the corporation is a scheme to defraud under Rule 10b-5. The corporation should have standing to recover losses it suffered as a result of the scheme and if necessary for this result, *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952), cert. denied, 343 U.S. 956 (1952) should be overruled.

I.A. §10(b) and Rule 10b-5 are violated when a board of directors is fraudulently induced to authorize the sale of securities owned by a corporation which results in the loss of an asset. It does not follow that merely because misrepresentations of investment value are actionable under 10b-5, that more outrageous types of misrepresentations are not actionable. See, *Hooper* v. *Mountain States Secu-*

rities Corp., 282 F.2d 195 (5th Cir. 1960), cert. denied, 365 U.S. 814, 81 S. Ct. 695 (1961). Misrepresentations that a seller will receive the proceeds from a sale of securities when in fact the perpetrators intend to convert said proceeds are also actionable. *Puharich* v. *Borders Electronics Co.*, CCH FED. SEC. L. REP. ¶92,141 (S.D.N.Y. 1968); *Goodman* v. *Hentz & Co.*, 265 F.Supp. 440 (N.D. Ill. 1967). This Court has held that misrepresentations in proxy solicitations unrelated to the terms of sale were within the purview of §14(a) of the Exchange Act. *Mills* v. *Electric Autolite Co.*, 396 U.S. 375, 90 S. Ct. 616 (1970). There is no reason why the conclusion reached in *Mills, supra* should not control 10b-5 actions.

To say, as did the Court of Appeals that the only fraud harmful to Manhattan was the failure of the perpetrators to account for the proceeds of the sale is to ignore the unity of the scheme: without the sale of the bonds (the securities transaction) there would have been no acquisition; without the fraud (deception of the board) there would have been no sale of bonds.

An allegation of fraud in the nature of deceit, practiced on the decision-making body of a corporation inducing a sale of securities which results in injury to the corporation, is sufficient to defeat a motion to dismiss the complaint for lack of subject matter jurisdiction. *Ruckle* v. *Roto American Corp.*, 339 F.2d 24 (2d Cir. 1964); *Dasho* v. *Susquehanna Corp.*, 380 F.2d 262 (7th Cir. 1967), cert. denied sub nom. *Bard* v. *Dasho*, 389 U.S. 977, 88 S. Ct. 480 (1967); *Globus, Inc.* v. *Jaroff*, 266 F.Supp. 524 (S.D.N.Y. 1967).

Where a corporation loses an asset as a result of a fraudulently induced securities transaction, the corporation may recover. *Hooper* v. *Mountain States Securities Corp.*, 282

F.2d 195 (5th Cir. 1960), cert. denied, 365 U.S. 814, 81 S. Ct. 695 (1961).

B. The fraudulent deprivation of the seller of the consideration bargained for in a sale of securities, even when committed by corporate insiders, is a Rule 10b-5 violation. *Puharich* v. *Borders Electronics Co.*, CCH FED. SEC. L. REP. ¶92,141 (S.D.N.Y. 1968); *Parker* v. *Baltimore Paint & Chemical Corp.*, 244 F.Supp. 267 (D. Col. 1965). Violators of Rule 10b-5 are not immunized from civil liability merely because their violations are part of a broader scheme of corporate mismanagement, even if corporate looting is the object or result of the securities fraud. *Rekant* v. *Desser*, 425 F.2d 872 (5th Cir. 1970); *Herpich* v. *Wallace*, 430 F.2d 792 (5th Cir. 1970); *Pappas* v. *Moss*, 393 F.2d 865 (3rd Cir. 1968). The policy of the Exchange Act would be frustrated if Rule 10b-5 were denied application in a case where a securities transaction was an integral part of the fraud merely because of the availability of a remedy in a state court.

C. The language of §10(b) and Rule 10b-5 is so plain that it obviates the need to examine extraneous matter in explanation of its meaning. Respondents' fraud comes within the common sense meaning of the statutory language. Further, it comes within the judicial test as set forth in *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 860 (2d Cir. 1968) (en banc), cert. denied sub nom. *Coates* v. *SEC*, 394 U.S. 976, 89 S. Ct. 1454 (1969) defining which frauds are "in connection with" a securities transaction.

It was incorrectly determined by the Court of Appeals that "the public interest" base for Rule 10b-5 was limited to protecting the integrity of the securities markets. The provisions of §78b of the Exchange Act indicate that the public interest was to prevent business losses caused by fraudulent

dealings in securities. Since Manhattan lost $5,500,000 as a result of respondents' fraudulent dealings in securities with Manhattan, the public interest is served by finding a cause of action under §10(b) to exist herein.

II. The Court of Appeals relied on *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952), cert. denied, 343 U.S. 956 (1952) to hold that since Manhattan was neither the purchaser nor seller of its stock, it lacked standing to sue even though the stock was purchased with Manhattan's portfolio bonds. *Birnbaum* survives even though this Court has repeatedly held that the goals of the securities acts are not to be frustrated by judicial interpretation. In addition, many lower courts have questioned *Birnbaum's* validity and have expanded the definitions of "purchaser" and "seller" in order to avoid the limiting effect of the purchaser-seller requirement.

No private right of action existed when Rule 10b-5 was promulgated. The SEC intended to regulate those against whom actions could be brought, not those on whose behalf private actions could be brought. The SEC promulgated the rule under its duty to protect the public at large as well as investors in securities. Further, the SEC has consistently argued as amicus that there is not and ought not to be a mechanical purchaser-seller test for determining standing to sue under Rule 10b-5. Therefore, the purchaser-seller restriction enunciated in *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952), cert. denied, 343 U.S. 956 (1952) should be abolished.

Manhattan was the victim of a "scheme to defraud." Since the vital center of the scheme was the sale of Manhattan's stock, it is unrealistic to say that the fraud was not committed "in connection with the purchase or sale of any security." To hold otherwise can only serve to ossify a

statutory scheme designed to be flexible and to create greater incentive for clever scheming.

III. Those issues raised in connection with the purchase and sale of Manhattan's bonds are also raised in connection with the purchase and sale of CD's subsequent to January 24, 1962. The arguments set forth in I, *supra,* are incorporated herein.

ARGUMENT

I.

The Court below erred in affirming the dismissal of the complaint where the record disclosed that a board of directors was fraudulently induced to authorize the sale of securities owned by a corporation and the proceeds of such sale were diverted from the corporation.

That Manhattan was the victim of a fraud was recognized both by the District Court and the Court of Appeals. Judge Herlands stated:

> "The complaint in this case presents no more than a complicated scheme of common law fraud." (A. 88a).

The majority opinion of the Court of Appeals stated:

> "What distinguishes the fraud perpetrated on Manhattan in this case from . . . ." (A. 105a)
>
> • • •
>
> "No doubt the deception was successful, for had the board known that Sweeny and his associates intended to misappropriate the proceeds for their own use it undoubtedly would not have authorized their sale." (A. 105a).

The only issue to be resolved is whether or not the fraud perpetrated on Manhattan is one which is federally cognizable.

Although some facts presented in support of the claim on appeal do not appear in the complaint, the Court of Appeals properly considered them. *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 430 F.2d 355, 360 (2d Cir. 1970).

The majority of the court below rejected jurisdiction under Rule 10b-5 on the grounds that the fraud was not committed "in connection with the purchase or sale of any security." Their decision was based on the following: (1) neither the purchaser nor the seller of Manhattan's bonds was deceived or defrauded with respect to the *terms of the sale* itself (A. 105a) (emphasis added); (2) the only fraud which harmed Petitioner was the failure of the perpetrators to account for the proceeds (A. 106a); (3) the *sole object* of the fraud was to obtain possession of Manhattan's bonds for the personal use of the perpetrators (A. 105a) (emphasis added); (4) the purposes of the federal securities legislation would not be served by holding Respondents' acts to be "in connection with" a securities transaction since the fraud did not affect the investing public nor the securities markets and there was no danger that the securities sold would be overvalued on reaching the public market (A. 106a-107a).

A. § 10(b) and Rule 10b-5 are Violated When a Board of Directors is Fraudulently Induced to Authorize the Sale of Securities of a Corporation.

The Court recognized that the board of directors of Manhattan was induced by misrepresentations to approve the sale of bonds. The Court held, however, that since the board was deceived as to the misappropriation of the pro-

ceeds from the sale and not as to the terms of the sale (i.e. value of the bonds or the consideration paid for them), there was no violation of Rule 10b-5. The three cases cited in support of this distinction are *Ruckle* v. *Roto American Corp.*, 339 F.2d 24 (2d Cir. 1964); *Globus, Inc.* v. *Jaroff*, 266 F.Supp. 524 (S.D.N.Y. 1967); and *Simon* v. *New Haven Board & Carton Co.*, 250 F.Supp. 297 (D. Conn. 1966). Each one of them upheld 10b-5 jurisdiction where the board of directors or shareholders were induced by misrepresentations of investment value into approving a sale or purchase of securities. However, there is no language in any of these decisions that limits federal jurisdiction to misrepresentations of investment value. Where it is alleged that a corporation has been defrauded into selling securities because the approval necessary for the transaction was induced by material misrepresentations of any kind, federal jurisdiction exists. Since this principle controls where the misrepresentations or omissions of material fact concern such things as the financial condition of a company or investment value, e.g., *Schoenbaum* v. *Firstbrook*, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied sub nom. *Manley* v. *Schoenbaum*, 395 U.S. 906, 89 S. Ct. 1747 (1969); *Pappas* v. *Moss*, 393 F.2d 865 (3rd Cir. 1968); *Ruckle, supra; Simon, supra*, certainly where the falsehoods involved are far more outrageous in that they conceal or fail to disclose that the seller will receive nothing for the asset it is deceived into surrendering, jurisdiction must also exist. See, *Stevens* v. *Vowell*, 343 F.2d 374 (10th Cir. 1965); *SEC* v. *Federal Shopping Way Inc.*, No. 7351 (W.D.N.D. Wash. August 6, 1969) aff'd, 433 F.2d 149 (9th Cir. 1970) (in which deposits were made into personal bank accounts carried in a corporate name so that endorsements on checks would not reveal the conversion); *Puharich* v. *Borders Electronics Co.*, CCH Fed. Sec. L. Rep. ¶92,141 (S.D.N.Y. 1968); *Good-*

man v. *Hentz & Co.*, 265 F.Supp. 440 (N.D. Ill. 1967). In *Goodman, supra* at 444-445, the Court stated:

> "The fact that the fraud was so substantial that entire transactions intended by plaintiffs to be purchases and sales for their accounts, amounted to complete conversions of their funds by Rubloff, does not deprive plaintiff's of their right to recover under the Securities Act, a right they clearly would have if Rubloff had perpetrated lesser frauds, such as misrepresentations concerning quality of stocks he recommended to them [citation omitted]; . . . . If there is any difference between the fraud in these cases and the fraud in the case at bar, it is only that the latter is more odious, because the customer loses his entire investment."

Not one cited authority indicates that jurisdiction should be denied, as did the Court below in the instant matter, if the misrepresentations inducing the transaction did not concern the terms of the sale of the securities themselves. In fact, the judgment appealed from represents the first time a federal court has so limited the scope of Rule 10b-5. This Court has held that in the fraudulent solicitation of proxies, the fact that the misrepresentation had nothing to do with the terms of the sale or that the sale itself was fair is irrelevant for purposes of determining whether plaintiff has stated a federal cause of action. *Mills* v. *Electric Autolite Co.*, 396 U.S. 375, 90 S. Ct. 616 (1970). There, this Court stated, at 396 U.S. 382, 90 St. Ct. 620:

> "The result [of permitting all liability to be foreclosed on the basis of a finding that the transaction was fair] would be to insulate from private redress an entire category of proxy violations—those relating to matters other than the terms of the merger. Even

> outrageous misrepresentations in a proxy solicitation, if they did not relate to the terms of the transaction, would give rise to no cause of action under § 14(a). Particularly if carried over to enforcement actions by the Securities and Exchange Commission itself, such a result would subvert the congressional purpose of ensuring full and fair disclosure to shareholders."

Although *Mills, supra,* concerned proxy solicitations under § 14(a) of the Exchange Act, the same reasoning should control in Rule 10b-5 actions. To hold otherwise would insulate from private redress that entire category of misrepresentations relating to matters other than the terms of the sale—a result that this Court has already rejected in *Mills.*

In applying the "terms of the sale test", the Court below conflicted with its earlier decision in *A. T. Brod & Co.* v. *Perlow,* 375 F.2d 393 (2d Cir. 1967). There, the Court held, at 375 F.2d 396-397:

> "Neither § 10(b) nor Rule 10b-5 contains any language which would indicate that those provisions were intended to deal only with fraud as to the investment value of securities, and, indeed, it is established that a 10b-5 action will survive even though the fraudulent scheme or device is unrelated to investment value. * * * Nor do we think it sound to dismiss a complaint merely because the alleged scheme does not involve the type of fraud that is 'usually associated with the sale or purchase of securities.' We believe that § 10(b) and Rule 10b-5 prohibit all fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws."

The Court of Appeals reasoned that since the "sole object [of the fraud] was to obtain possession of Manhattan's government bonds for the personal use of the perpetrators," it was not cognizable under Rule 10b-5 (A. 105a). This construction conflicts with the principle that federal securities legislation should be construed without regard to technical and restrictive notions of intent "but flexibly to effectuate its remedial purposes." *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195, 84 S. Ct. 275, 284-285 (1963). As the Senate Committee stated, "Motive furnishes no justification for the employment of manipulative or deceptive devices." S. Rep. No. 1455, 73d Cong., 2d Sess. (1934).

To say, as did the Court of Appeals, that the only fraud harmful to Manhattan was the failure of the perpetrators to account for the proceeds from the sale is to ignore the unity of the scheme. The perpetrators of the fraud recognized that in order to obtain the funds necessary to pay Bankers Life for the stock of Manhattan, the board of directors would be required to authorize the sale of bonds owned by Manhattan. These bonds were ultimately the source of funds with which Manhattan was purchased. Without the sale of the bonds (the securities transaction) there would have been no acquisition; without the fraud (deception of the board) there would have been no sale of bonds. There is no logic in separating the deception of the board from the sale of securities it authorized. Indeed, the Court below accepted the fact that had the board not been deceived, it would not have authorized the sale of securities (A. 105a).

The device here used to dislodge the bonds from the corporation was fraud in the nature of deceit, practiced upon the decision-making body of the corporation inducing a sale of securities which resulted in injury to the cor-

poration. This allegation of federal fraud is sufficient to defeat a motion to dismiss the complaint. See, e.g., *Ruckle, supra, Dasho* v. *Susquehanna Corp.*, 380 F.2d 262 (7th Cir. 1967), cert denied sub nom. *Bard* v. *Dasho*, 389 U.S. 977, 88 S. Ct. 480 (1967); *Hooper* v. *Mountain States Securities Corp.*, 282 F.2d 195 (5th Cir. 1960), cert. denied, 365 U.S. 814, 81 S. Ct. 695 (1961); *Erling* v. *Powell*, 429 F.2d 795 (8th Cir. 1970); *Globus, supra; Parker* v. *Baltimore Paint and Chemical Corp.*, 244 F.Supp. 267 (D. Col. 1965); *Simon* v. *New Haven Board and Carton Co.*, 250 F.Supp. 297 (D. Conn. 1966); *O'Neill* v. *Maytag*, 230 F.Supp. 235, 239 (S.D.N.Y. 1964); *Dauphin* v. *Sentinel Alarm Corp.*, 206 F.Supp. 432 (D. Del. 1962). In the District Court's terminology, this is an impure transaction in securities, one tainted by fraud and deceit.

Petitioner is in precisely the same position as was the plaintiff in *Hooper* v. *Mountain States Securities Corp.*, 282 F.2d 195 (5th Cir. 1960), cert. denied, 365 U.S. 814, 81 S. Ct. 695 (1961). There, a trustee in bankruptcy was recognized as a proper party to maintain an action on behalf of the corporation which had been defrauded. A transfer agent was fraudulently induced to issue corporate stock by misrepresentations that a sale had occurred and was approved by the board of directors. Upon the issuance of $700,000 worth of securities by the transfer agent, the corporation was given worthless properties. No sale or approval had taken place. The Court, in effect, constructed a sale to bring the case within Rule 10b-5. The Fifth Circuit held that the misrepresentations made to the transfer agent inducing the "sale" constituted a violation of Rule 10b-5 where the corporation received inadequate consideration. In short, all that must be established to support federal jurisdiction is injury to the corporation as a result of a fraudulent securities transaction. See,

Hoover v. *Allen*, 241 F.Supp. 213 (S.D.N.Y. 1965); *New Park Mining Co.* v. *Cranmer*, 225 F.Supp. 261 (S.D.N.Y. 1963); *Simon* v. *New Haven Board & Carton Co.*, 250 F.Supp 297 (D. Conn. 1966). Manhattan was injured by the sale of its securities because it received no consideration at all. The *Hooper* Court rested its holding on the theory that the treasury stock of the corporation was an asset of that corporation having a specific value, and that what amounted to the loss of that asset was a loss to the company for which recovery was allowed. It said, in pertinent part, at 282 F.2d 203:

> "... we would be blind to all we hear and read about were we to succumb to the artificial contention that the issuance of this stock made the corporation no poorer so that the only persons who suffered were the stockholders for whom the suit cannot be brought ... considering the purpose of this legislation it would be unrealistic to say that a corporation having the capacity to acquire $700,000 worth of assets has suffered no loss if what it gave up was $700,000 but what it got was zero. If—as we very much doubt—accountants would support any such contention as a consequence of the esoteric mysteries of the double entry system, the law with its eye on reality, would have to part company with such purists."

Again, as Judge Herlands said in another case:

> "Plaintiffs allege that the defendants' scheme will directly result in the final transfer of the stock to Borders without receipt of that consideration. Surely, that is a sufficient charge of injury to the corporation." *Puharich* v. *Borders*, CCH FED. SEC. L. REP. ¶ 92,191 (1968).

B. § 10(b) and Rule 10b-5 are Violated When the Proceeds From a Sale of Securities are Misappropriated.

Assuming, *arguendo,* that the board was not induced by misrepresentations into authorizing the sale of bonds, the mere fraudulent deprivation from the seller of the consideration bargained for, even when committed by corporate insiders, is a violation of Rule 10b-5. *Puharich* v. *Borders Electronics Co., supra; Parker* v. *Baltimore Paint & Chemical Corp.,* 244 F.Supp. 267 (D. Col. 1965). In *Parker, supra,* the Court noted that acts amounting to corporate mismanagement, namely, conversion of the sale price, were fraudulent acts in connection with the earlier sale of securities which in itself was pure. Thus, if the sale of bonds was not fraudulently induced, and if the proceeds from the sale were paid into Manhattan's account (assuming for the moment that Manhattan had an account), and the proceeds were then converted by corporate insiders pursuant to the scheme to pay Irving Trust for the check to Bankers Life, a violation of Rule 10b-5 would still exist. See, *Cooper* v. *North Jersey Trust Co.,* 226 F.Supp. 972 (S.D.N.Y. 1964); *United States* v. *Robertson,* 181 F.Supp. 158 (S.D.N.Y. 1959) aff'd, 298 F.2d 739 (2d Cir. 1962); *In re Calvert,* 35 S.E.C. 141 (1953); *In re Lockaby,* 29 S.E.C. 271 (1949). See also: *Allico Nat'l Corp.* v. *Amalgamated Meat Cutters,* 397 F.2d 727 (7th Cir. 1968).

Respondents attempt to wish away the existence of an intricate securities fraud by arguing that the securities transactions which were the heart of the scheme were merely incidental to acts of corporate waste and mismanagement. They conclude that such acts were not intended to be remedied by the federal securities laws. (Respondents' Brief In Opposition To The Petition For A Writ of Certiorari at 5, 7). A majority of the Court of Appeals agreed. However the Court and Respondents disre-

garded the plain fact that each fraudulent act including the misappropriation of the proceeds by defendants was a vital part of one scheme and the successful perpetration of the scheme damaged the corporation to the extent of $5,500,000. The Court below has severed the misappropriation of proceeds from the sale of bonds and held that the misappropriation allegations (which constitute corporate mismanagement also) standing alone do not constitute a 10b-5 case. The Court, however, is

> "not at liberty to disregard [Petitioner's] allegations and to now hold that the charges are unrelated." *Parker* v. *Baltimore Paint & Chemical Corp.*, 244 F. Supp. 267, 270 (D. Col. 1965).

As the District Court recognized:

> "The direct involvement of the deceit with a transaction in securities is fraud 'in connection with' the sale of the stock, and consequently constitutes federal fraud irrespective of whether it also constitutes corporate mismanagement." *Superintendent of Insurance* v. *Bankers Life and Casualty Co.*, 300 F.Supp. 1083, 1102-1103 (S.D.N.Y. 1969) (A. 85a).

Violators of Rule 10b-5 are not immunized from civil liability for their unlawful acts merely because those acts were committed as part of a broader scheme of corporate mismanagement, *Herpich* v. *Wallace*, 430 F.2d 792 (5th Cir. 1970); *Landay* v. *United States*, 108 F.2d 698 (6th Cir. 1939) cert. denied, 309 U.S. 681, 60 S. Ct. 721 (1940); *Kane* v. *Central American Mining & Oil, Inc.*, 235 F.Supp. 559, 564 (S.D.N.Y. 1964); *New Park Mining Co.* v. *Cranmer*, 225 F.Supp. 261, 266 (S.D.N.Y. 1963); even if corporate looting is the object or result of the securities fraud. *Rekant* v. *Desser*, 425 F.2d 872 (5th Cir. 1970); *Herpich*

v. *Wallace*, 430 F.2d 792 (5th Cir. 1970); *Pappas* v. *Moss*, 393 F.2d 865 (3rd Cir. 1968). See, *Errion* v. *Connell*, 236 F.2d 447, 454 (9th Cir. 1956).

A federal cause of action under § 10(b) and Rule 10b-5 exists "notwithstanding that the perpetrators of the fraud are corporate insiders liable under state law." *Rekant* v. *Desser*, 425 F.2d 872, 882 (5th Cir. 1970). See, *J.I. Case* v. *Borak*, 377 U.S. 426, 84 S. Ct. 1555 (1964); *Matheson* v. *Armbrust*, 284 F.2d 670, 673 (9th Cir. 1960), cert. denied, 365 U.S. 870, 81 S. Ct. 904 (1961); *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627 (2d Cir. 1967), cert. denied, 389 U.S. 970, 88 S. Ct. 463 (1967); *O'Neill* v. *Maytag*, 339 F.2d 764 (2d Cir. 1964). It would frustrate the policy of the Exchange Act if Rule 10b-5 was denied application in a case where a securities transaction was an integral part of the fraud merely because of the availability of a remedy in a State Court. *O'Neill* v. *Maytag*, 339 F.2d 764, 768 (2d Cir. 1964) (dictum); cf. *Voege* v. *American Sumatra Tobacco Corp.*, 241 F.Supp. 369, 375 (D. Del. 1965); Note, Private Enforcement Under Rule 10b-5: An Injunction For A Corporate Issuer, 115 U. Pa. L. Rev. 618, 621 (1967). Moreover, § 78bb(a) of the Exchange Act permits a remedy under the Act in addition to any state and other federal remedies:

> "The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity"

Thus, the misappropriation of the proceeds from the sale of Manhattan's bonds was itself a fraud in connection with a securities transaction. Even if deemed to be an act of corporate mismanagement, the misappropriation is nevertheless actionable under 10b-5 as being an act committed as part of an overall fraudulent scheme.

C. The Purposes of the Securities Exchange Act of 1934 Are Served by Finding a Violation of § 10(b) and Rule 10b-5.

The language of §10(b) and Rule 10b-5 is so plain that it obviates the need to examine extraneous matter in explanation of its meaning. See, *Fratt* v. *Robinson*, 203 F.2d 627 (9th Cir. 1953). It is apparent that respondents' fraud comes within the statutory language, ". . . in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered any manipulative or deceptive device . . ." in the common sense meaning of those words. §78j(b) of the Exchange Act.

"We see no reason to go beyond the plain meaning of the word 'any', indicating that the use of manipulative or deceptive devices or contrivance of whatever kind may be forbidden. . ." *Rekant* v. *Desser*, 425 F.2d 872, 880 n.15 (5th Cir. 1970).

It cannot be successfully contended that the fraud perpetrated on the board of directors was not "in connection with" a securities transaction. It has been repeatedly held that a fraud is "in connection with" a securities transaction where:

> ". . . the device employed, whatever it might be, be of a sort that would cause reasonable investors to rely thereon, and, in connection therewith, so relying, cause them to purchase or sell a corporation's securities."

SEC v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 860 (2d Cir. 1968) (en banc), cert. denied sub nom. *Coates* v. *SEC*, 394 U.S. 976, 89 S. Ct. 1454 (1969). Accord, *Heit* v. *Weitzen*, 402 F.2d 909 (2d Cir. 1968), cert. denied, 395 U.S. 903, 89 S. Ct. 1740 (1969); *City Nat'l Bank* v. *Vanderboom*, 422 F.2d 221 (8th Cir. 1970), cert. denied, 399 U.S. 905, 90 S. Ct. 2196 (1970); *Herpich* v. *Wallace*, 430 F.2d 792, 806 (5th Cir.

1970). It is evident from these cases that the purpose of §10(b) and Rule 10b-5 is to ensure disclosure that would effect decisions to buy or sell securities. See also, *Tcherepnin* v. *Knight*, 389 U.S. 332, 88 S. Ct. 548 (1967). Its application is called for in any case where the defrauding management (and/or outsiders) is not the sole decision-making body. *Fleischer, Federal Corporation Law: An Assessment*, 78 HARV. L. REV. 1146, 1163 (1965). The misrepresentations inducing the board of directors to authorize the sale of bonds calls for the application of §10(b) and Rule 10b-5.

In order to direct the Court's attention away from the unambiguous language of §10(b) and Rule 10b-5, respondents have argued and the lower courts agreed that the statutory purposes would not be served by finding the fraud to be "in connection with" a securities transaction. The Second Circuit had repeatedly given a broad construction to the "in connection with" clause. See, *Ruckle* v. *Roto American Corp., supra; Vine* v. *Beneficial Finance Co., supra; Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), cert. denied, 400 U.S. 822, 91 S. Ct. 41 (1970). The Court of Appeals has now departed from its precedents and put a limiting interpretation on §10(b), contrary to the well founded principle that the securities acts are remedial provisions that should be construed broadly and flexibly. *Tcherepnin* v. *Knight*, 389 U.S. 332, 336, 88 S. Ct. 548, 553 (1967); *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195, 84 S. St. 275, 284-285 (1963); *Herpich* v. *Wallace*, 430 F.2d 792 (5th Cir. 1970); *Kahan* v. *Rosenstiel*, 424 F.2d 161, 172 (3rd Cir. 1970), cert. denied sub nom. *Glen Alden Corp.* v. *Kahan*, 398 U.S. 950, 90 S. Ct. 1870 (1970); *Hooper* v. *Mountain States Securities Corp., supra.*

The regulation has two bases—"in the public interest" or "for the protection of investors." §78j(b) of the Exchange Act.

> "Each [base] fully justified the regulation. Its [the regulation] validity does not therefore depend on its being issued 'for the protection of investors.'"

Hooper, supra at 202. The Court of Appeals found that the public interest cognizable by §78j(b) is limited to preserving the integrity of the securities markets (A. 107a). To equate "the public interest" with "preserving the integrity of the securities markets" is to eliminate one of the independent bases of the regulation. By preserving the integrity of the securities markets, it is not the public, but the investors who are protected. Therefore, "the public interest" must mean something other than the limited definition offered by the Court of Appeals. Congress and the courts have furnished guidelines as to what is defined as "the public interest."

In §78b of the Exchange Act, Congress states that it is regulating securities transactions because they

> "involve the use of credit, directly affect the financing of trade, industry, and transportation in interstate commerce, and directly affect and influence the volume of interstate commerce; and affect the national credit." §78b(1)(d).

Congress was concerned with

> "National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare . . ., and to meet such emergencies the Federal Government

is put to such great expense as to burden the national credit.' §78b(4).

These provisions reflect the national economic emergency that led to their enactment. The public interest was not merely to protect the securities markets, but it was to prevent bankruptcies and business losses caused by fraudulent dealings in securities. See *Hooper* v. *Mountain State Securities Corp., supra,* (keep the channels of interstate commerce pure from fraudulent schemes, tricks, devices); *Herpich* v. *Wallace, supra,* (maintain a viable vigorous business community); *Silver* v. *New York Stock Exchange,* 196 F. Supp. 209 (S.D.N.Y. 1961) rev'd, 302 F.2d 714 (2d Cir. 1962) rev'd, 373 U.S. 341, 83 S. Ct. 1246 (1963) (protect national economy and national financial system); *American Sumatra Tobacco Corp.* v. *SEC,* 110 F.2d 117 (D.C. Cir. 1940) (protect banks in which loans are secured by such securities as collateral). This precise evil is the subject of the instant suit: respondents' fraudulent dealings with Manhattan in securities led to its bankruptcy. The public interest contemplated by Congress in enacting the Exchange Act is served by finding a cause of action under §10(b) to exist herein.

It is not essential, therefore, that for a corporation to come under §10(b) and Rule 10b-5 it have the status of an investor. *Hooper* v. *Mountain State Securities Corp.,* 282 F.2d 195, 202 (5th Cir. 1960); *New Park Mining Co.* v. *Cranmer, supra.* In holding that Rule 10b-5 was violated even though 1) plaintiff was not an investor, 2) no fraud was alleged with regard to investment value of securities and 3) there was no danger that thin or watered stock would be distributed, the Second Circuit stated:

"Neither §10(b) nor Rule 10b-5, it appears, speaks in terms of limiting the nature of the violation to one

involving fraud of 'investors'; nor is there any justification for reading such an additional requirement into the Act." *A.T. Brod & Co.* v. *Perlow,* 375 F.2d 393, 396 (2d Cir. 1967).

§ 10(b) was intended to be as broad as the Act itself, serving to fill any gaps left by more specific provisions in preventing "cunning devices." Hearings on H.R. 7852 and 8720, *House Committee On Interstate and Foreign Commerce,* 73d Cong., 2d Sess. 115; See also H. Rep. No. 1383, 73d Cong., 2d Sess. 6 (1934). Congress created a structure and legal framework for the whole field of securities designed to be flexible and to meet unforeseen problems, and to deal not only with problems attendant upon the trading of securities through organized markets. H.R. Rep. No. 85, 73d Cong. 1st Sess. 2-4 (1933); H.R. Rep. No. 1383, 73d Cong, 2d Sess. 2-5 (1934). This is likewise true of the anti-fraud provisions. Loss, L., *Securities Regulation,* at 1467 (2d ed. 1961). In enacting the anti-fraud provisions, Congress was attempting to prohibit any acts in contravention of the overall philosophy of the maintenance of a fraud-free post-issuance securities market to complement and support those other provisions contained in the acts designed to insure the absence of fraud in the issuance of securities. *Brennan* v. *Midwestern United Life Insurance Co.,* 259 F.Supp. 673 (D. Ind. 1966) 417 F.2d 147 (7th Cir. 1969), cert. denied, 397 U.S. 989, 90 S. Ct. 1122 (1970).

The "in connection with" clause "is plainly and—one must assume—intentionally the loosest linkage, in any of the federal anti-fraud provisions, between a proscribed act and a security transaction." Bromberg, A., *Securities Law: Fraud—SEC Rule 10b-5,* § 7.6(1), p. 190.21 (1969). See, *Rekant* v. *Desser,* 425 F.2d 872, 880 n. 15 (5th Cir. 1970).

From an examination of the statutory provisions, judicial interpretations, and legislative history, it must be con-

cluded that the purposes of the federal securities acts would be served by holding the fraud alleged in the instant case to be "in connection with" a securities transaction.

II.

The purchaser-seller restriction enunciated in *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952), cert. denied, 343 U.S. 956 (1952) should be abolished.

Without reaching the question of whether Petitioner alleged a violation of Rule 10b-5 in connection with the purchase and sale of the Manhattan stock, the Court of Appeals found that since Manhattan was neither a purchaser or seller of the stock, it lacked standing to sue. The Court relied on *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952), cert. denied, 343 U.S. 956 (1952) and its reaffirmation in *Greenstein* v. *Paul*, 400 F.2d 580 (2d Cir. 1968).

This Court has long held that the goals of the securities acts ought not be frustrated by judicial interpretation. *E.g.*, *SEC* v. *W. J. Howey Co.*, 328 U.S. 293, 66 S. Ct. 1100 (1946); *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 64 S. Ct. 120 (1949); *Deckert* v. *Independence Share Corp.*, 311 U.S. 282, 61 S. Ct. 229 (1940); and this view has continued down to the present. *Mills* v. *Electric Autolite Co.*, 396 U.S. 375, 90 S. Ct. 616 (1970); *SEC* v. *National Securities*, 393 U.S. 453, 89 S. Ct. 564 (1969); *J.I. Case* v. *Borak*, 377 U.S. 426, 84 S. Ct. 1555 (1964); *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 84 S. Ct. 275 (1963). The conception of what is a cognizable fraud under the securities acts has undergone a process of development and expansion. The history of the acts and Rule in the courts

has left no doubt that a plaintiff need not meet the five-element test of common law fraud. This is clearly indicated from the text of § 17(a) and Rule 10b-5. Each of these have three subdivisions which read in the disjunctive.

Subdivision (1) is the catch-all provision which speaks of any device, scheme or artifice to defraud, and that is all. Subdivision (2) speaks of affirmative misrepresentation either by a false statement or by the omission to make a necessary statement under the circumstances. Subdivision (3) combines elements of the foregoing subdivisions. Thus it speaks of both fraud and deceit and treats misrepresentation by actions as well as otherwise. The clear purport of both the statute and the rule was to inspire maximum application.

The courts have recognized the artificiality of the limitation imposed by the purchaser-seller rule. See, *SEC* v. *National Securities, supra,* (dissenters thought majority had loosely construed *Birnbaum*); *Hooper* v. *Mountain State Securities Corp.*, 282 F.2d 195 (5th Cir. 1960); *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627 (2d Cir. 1967), cert. denied, 389 U.S. 970, 88 S. Ct. 463 (1967); *Rekant* v. *Desser,* 425 F.2d 872 (5th Cir. 1970); *Kahan* v. *Rosenstiel,* 424 F.2d 161 (3rd Cir. 1970), cert. denied sub nom. *Glen Alden Corp.* v. *Kahan,* 398 U.S. 950, 90 S. Ct. 1870 (1970) (injunctive relief); *Stockwell* v. *Reynolds,* 252 F.Supp. 215 (S.D.N.Y. 1965).

Similarly the SEC has consistently argued as amicus that there is not and ought not to be a mechanical purchaser-seller test for determining standing to sue under Rule 10b-5. *Vine* v. *Beneficial Finance Co., supra; Pacific Insurance Co.* v. *Blot,* 267 F.Supp. 956 (S.D.N.Y. 1967).

Where a private right of recovery is court-created it is likewise within the proper powers of the court to determine

the scope of that right. The court in *Birnbaum* relied heavily on the statement of the SEC that Rule 10b-5 closed a loophole with regard to fraudulent purchases of securities in holding the right of action to be limited to defrauded purchasers or sellers, rather than on the legislative history of the act. The SEC originally promulgated the rule under its duty to protect the public at large and investors in securities (See Point IC, *infra*). It would seem both judicially proper and appropriate for the courts to rely as heavily today on the position of the SEC in interpreting its own rule as they did in 1952.

Furthermore, it should be noted that Rule 10b-5 was promulgated in 1942, fully four years before a private action for fraud was recognized by the courts. The SEC was concerned at the time with those against whom actions could be brought, not those on whose behalf private actions could be brought, since no private right of action existed at the time.

The Court of Appeals, however, felt it was bound by its decision in *Greenstein* v. *Paul,* 400 F.2d 580 (2d Cir. 1968). The Court there held that it was necessary for a plaintiff to have been either a purchaser or seller of securities to sustain federal jurisdiction in an action for damages. Unlike *Greenstein, supra,* Petitioner here is not seeking a speculative recovery. Petitioner's damages were fixed by its actual losses of $5,500,000, and is thus entitled to sue in the federal courts for damages resulting from the violation of the securities laws. As Judge Hays stated in his dissenting opinion (A. 109a):

> "Manhattan was the victim of a 'scheme . . . to defraud' (Rule 10b-5). * * * Since the vital center of the scheme, the vehicle for the perpetration of the fraud, was the sale of Manhattan's stock, it seems

to me to be completely unrealistic to say that the fraud was not committed 'in connection with the purchase or sale of any security.'"

To hold otherwise when not demanded by law, logic, or sound principles of statutory interpretation can only serve to ossify a statutory scheme designed to be flexible and to create greater incentive for clever scheming.

III.

The Court of Appeals erroneously ruled that petitioner failed to allege a federal cause of action in connection with the transactions in certificates of deposit.

Subsequent to January 24, 1962, Manhattan was the victim of several separate and distinct proscribed schemes or devices over the following fifteen month period before the facts came to light and Manhattan was placed in liquidation. The schemes or devices are described in The Facts at pp. 6 through 12, *supra*.

Those issues raised in connection with the purchase and sale of Manhattan's bonds are also raised in connection with the purchase and sale of CD's subsequent to January 24, 1962. The Court of Appeals held that Petitioner failed to state a violation of Rule 10b-5 with regard to the latter set of transactions on substantially the same grounds given for denying jurisdiction regarding the events of January 24, 1962: that regardless of any deceit inducing the transactions or misapplication of proceeds after the transactions, as long as the CD's were bought and sold for their full face amount, there was no fraud in connection with their purchase and sale within the meaning of Rule 10b-5.

Petitioner expressly incorporates herein the arguments set forth in I *supra* establishing that the Court of Appeals has ruled erroneously on these issues.

Furthermore, Manhattan was defrauded in connection with the sale of the $500,000 First National Bank of Boston CD. As a result of the misrepresentations to Sweeny, Manhattan's agent, the proceeds from the sale of the CD were diverted to pay off the debt of New England Note. Sweeny, as President of Manhattan, had authorized its sale only to effect payment for a new certificate. Petitioner is therefore entitled to recover on behalf of Manhattan and its creditors as a defrauded seller of securities within the meaning of § 10(b) and Rule 10b-5.

Petitioner is further entitled to recover as the defrauded purchaser of the Irving Trust CD's under §17(a). The monies paid by Manhattan to effect payment on the CD's issued by Irving Trust were diverted and paid into the account of Garvin pursuant to the scheme, and the CD's were delivered to Marine Midland where they were held as collateral for a loan to Garvin and Garvin, Bantel.

There is only one sum of money in the amount of $5,500,000 involved in all these schemes and separate recovery for each of the separate and distinct fraudulent schemes is not demanded in excess of that amount. Nonetheless, liability would attach at any one of a number of junctures along the path that led to the liquidation of Manhattan. At each, Manhattan had an asset or a potential asset which was rendered valueless to, or the proceeds of which were diverted away from Manhattan. Indeed these fraudulent transactions, although distinct violations, can be viewed as being part of the original purchase and sale transactions of January 24, 1962. They were the direct result of the fact that Manhattan never received any consideration for its bonds sold that day.

CONCLUSION

The allegations of the complaint as amplified by the record before the Court discloses that the board of directors of Manhattan was fraudulently induced to authorize the sale of securities. The deception of the board was part of an overall scheme to loot the assets of Manhattan by selling its securities. As part of that scheme and as a separate fraudulent act in connection with the sale of securities, the proceeds from such sale were misappropriated so that Manhattan sold a valuable asset and received nothing in return.

The Court below, although recognizing the existence of a fraud, erred in not finding it to be a federally cognizable fraud under §10(b) and Rule 10b-5. Furthermore, Petitioner has established its standing to sue in connection with the purchase and sale of Manhattan's stock. For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be reversed and the cause remanded to the District Court for trial.

Respectfully submitted,

ARNOLD BAUMAN
Attorney for Petitioner
45 Rockefeller Plaza
New York, N. Y. 10020

PHILIP M. KAZIN
MORTON J. SCHLOSSBERG
Of Counsel

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question presented	2
Statutes and rules involved	2
Statement	4
The interest of the Securities and Exchange Commission	8
Argument:	
Section 10(b) of the Securities Exchange Act and Rule 10b-5 Thereunder Prohibit A Fraudlent Scheme Through Which Corporate Insiders Induce the Corporation to Sell Its Portfolio Securities by Misrepresenting that the Proceeds of the Sales will be Returned to the Corporation	12
A. Introduction and summary	12
B. Inducing an investor, Manhattan, to sell its securities as part of a fraudulent scheme to transfer control and strip it of its assets, upon the explicit misrepresentation that the securities would be sold and the proceeds reinvested for its benefit, constitutes a fraud perpetrated "in connection with" that sale for the purposes of Section 10(b) and Rule 10b-5	14
1. Section 10(b) must be interpreted broadly to effectuate its regulatory purposes	14

Argument—Continued Page

2: Whether the events alleged are considered narrowly, as a misrepresentation regarding the use to be made of the proceeds of a sale of securities, or more broadly, as a scheme or course of conduct involving misrepresentation, authorization of sale by the board of directors, sale, and misappropriation of the proceeds, they constitute fraudulent conduct "in connection with" the sale of Manhattan's government bonds 18

a. Misrepresentation regarding the use to be made of the proceeds of a sale of securities constitutes fraudulent conduct "in connection with" that sale..... 19

b. The alleged sequence of events—misrepresentation, authorization of sale by the board of directors, sale, and misappropriation of the proceeds—viewed as a whole demonstrates a fraud which occurred "in connection with" the sale of Manhattan's government bonds 22

C. A corporate holder of securities, even though wholly owned by a single shareholder, is a "person" protected by Section 10(b) and Rule 10b-5..... 26

Conclusion 30

CITATIONS

Cases:

	Page
Allico National Corp. v. *Amalgamated Meat Cutters & Butcher Workmen*, 397 F. 2d 727	19
Beury v. *Beury*, 222 F. 2d 464	26
Birnbaum v. *Newport Steel Corp.*, 193 F. 2d 461, certiorari denied, 343 U.S. 956	7, 8, 24
A. T. Brod & Co. v. *Perlow*, 375 F. 2d 393	21, 25
J. I. Case Co. v. *Borak*, 377 U.S. 426	9, 26, 29
Calvert Securities Corp., 35 S.E.C. 141	20
Coffee v. *Permian Corp.*, 434 F. 2d 383	7
W. F. Coley & Co., 31 S.E.C. 722	20
Columbia General Investment Corp. v. *Securities and Exchange Commission*, 265 F. 2d 559	25
Cooper v. *North Jersey Trust Co.*, 226 F. Supp. 972	20
D. S. Waddy & Co., 30 S.E.C. 367	20
Dasho v. *Susquehanna Corp.*, 380 F. 2d 262, certiorari denied, *sub nom. Bard* v. *Dasho*, 389 U.S. 977	24
Ellis v. *Carter*, 291 F. 2d 270, dismissal affirmed, 328 F. 2d 573	26
Errion v. *Connell*, 236 F. 2d 447	21, 25
Fischman v. *Raytheon Mfg. Co.*, 188 F. 2d 783	26
Globe Securities Co., Ltd., 10 S.E.C. 1105	20
Goodman v. *H. Hentz & Co.*, 265 F. Supp. 440	20
Heit v. *Weitzen*, 402 F. 2d 909, certiorari denied, 395 U.S. 903	25
Herpich v. *Wallace*, 430 F. 2d 792	11, 17, 24, 29

Cases—Continued

Page

Hooper v. *Mountain States Securities Corp.*, 282 F. 2d 195, certiorari denied, 365 U.S. 814 ..... 11, 17, 19, 21, 25, 26, 27, 28
Hoover v. *Allen*, 241 F. Supp. 213 5
Janigan v. *Taylor*, 344 F. 2d 781, certiorari denied, 382 U.S. 879 26
Jordan Bldg. Corp. v. *Doyle, O'Connor & Co.*, 401 F. 2d 47 26
Kahan v. *Rosenstiel*, 424 F. 2d 161, certiorari denied *sub nom. Glen Alden Corp.* v. *Kahan*, 398 U.S. 950 ..... 7, 17, 24-25
Los Angeles Tr. D. & M. Exchange v. *Securities and Exchange Commission*, 285 F. 2d 162, certiorari denied, 336 U.S. 919 19
McClure v. *Borne Chemical Co.*, 292 F. 2d 824, certiorari denied, 368 U.S. 939 ..... 17, 24, 26
Matheson v. *Armbrust*, 284 F. 2d 670 ..... 11, 24
Mills v. *Electric Auto-Lite Co.*, 396, U.S. 375 ..... 9, 10, 21
Myzel v. *Fields*, 386 F. 2d 718 26
Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294 20
Ottosen v. *Kaymac Industries, Inc.*, Civ. No. 407-69 (D. Utah) 11
Pappas v. *Moss*, 393 F. 2d 865 ..... 24, 29
People v. *Sweeny*, 27 N.Y. 2d 138 6
Pepper v. *Litton*, 308 U.S. 295 ..... 20, 28
Pettit v. *American Stock Exchange*, 217 F. Supp. 21 27
Puharich v. *Borders Electronics Co., Inc.* ['67-'69 Tr. B.] CCH Fed. Sec. L. Rep., ¶ 92,141 19-20
Rekant v. *Desser*, 425 F. 2d 872 ..... 17, 24, 29

Cases—Continued Page

Schoenbaum v. *Firstbrook*, 405 F. 2d 215, certiorari denied *sub nom. Manley* v. *Schoenbaum*, 395 U.S. 906 ..... 24, 25, 29
Securities and Exchange Commission v. *Bowler*, 427 F. 2d 190 ..... 19, 24
Securities and Exchange Commission v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 ..... 9, 18, 26
Securities and Exchange Commission v. *Federal Shopping Way*, Civ. 7351 (W.D. Wash.), affirmed, 433 F. 2d 148 19
Securities and Exchange Commission v. *Fifth Avenue Coach Lines*, 289 F. Supp. 3, affirmed, 435 F.2d 510 24
Securities and Exchange Commission v. *First Devonshire Corp.*, 70 Civ. 3752 (S.D.N.Y.) 21
Securities and Exchange Commission v. *Kelly*, CCH Fed. Sec. L. Rep., ['48-'52 Tr. B.] ¶ 90,497 20
Securities and Exchange Commission v. *Lawson*, 24 F. Supp. 360 20
Securities and Exchange Commission v. *National Securities, Inc.*, 393 U.S. 453 ..... 7, 9, 11, 24, 26, 30
Securities and Exchange Commission v. *Parvin Dohrmann Co., et al.*, (S.D. N.Y.) 69 Civ. 4543, S.E.C. Lit. Rel. Nos. 441, 459, 475, 448 24
Securities and Exchange Commission v. *Charles Plohn & Co.*, 433 F. 2d 376 21
Securities and Exchange Commission v. *Robinson & Co.*, Civ. 70-2396 (E.D. Pa.) 21
Securities and Exchange Commission v. *Texas Gulf Sulphur*, 401 F. 2d 833, certiorari denied, 394 U.S. 976 21